A

CME GROUP BHD v. BELLAJADE SDN BHD & ANOTHER APPEAL

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN PCA
ZAINUN ALI FCJ
B AZAHAR MOHAMED FCJ
ZAHARAH IBRAHIM FCJ
BALIA YUSOF WAHI FCJ
[CIVIL APPEALS NO: 02(f)-136-11-2017(W)
& 02(f)-135-11-2017(W)]
C 25 SEPTEMBER 2018

CONTRACT: *Agreement – Tenancy agreement – Breach – Tenant defaulted in payment of rental – Claim for recovery of outstanding and remaining rentals by landlord – Tenancy contravened express condition of title of land where premises*
D *were built on – Whether tenant aware of contravention of express condition of title when it entered into tenancy agreement – Whether tenancy agreement valid – Whether tenancy agreement contract discovered to be void within meaning of s. 66 of Contracts Act 1950 – Whether tenant liable to pay outstanding rental due under tenancy agreement – Whether tenant entitled to recover payments of rental*
E *previously made*

LAND LAW: *Conversion – Submission for surrender, re-alienation, amalgamation and conversion of land use from 'residential' to 'commercial' and 'mixed development' – Whether approval by State Authority operates as approval of land use – Whether change of condition of land takes effect upon endorsement of same on issue document*
F *of title to land – Whether tenancy for commercial use of land, which was by condition for residential use, illegal and void – National Land Code, ss. 89, 124, 128 & 204*

Bellajade Sdn Bhd ('the plaintiff') was the registered owner of an office building ('the said premises'). The land was previously owned by Orion
G Choice Sdn Bhd ('Orion') and prior to that, Kris Angsana Sdn Bhd ('Kris Angsana'). In 2013, the plaintiff entered into a sale and purchase agreement ('the SPA') with CME Group Bhd ('the first defendant') for a term of three years for commercial use ('the tenancy agreement'). Pursuant to the tenancy agreement, (i) the first defendant agreed to rent from the plaintiff the said
H premises at a rental of RM1,018,750 per month for a fixed term of three years; and (ii) the performance of the tenancy agreement was guaranteed by Tan Sri Dato' Lim Cheng Pow ('the second defendant'). When the first defendant defaulted in the payment of rental, the plaintiff commenced an action against the defendants, claiming for (i) the recovery of rentals and

I

interest, in the amount of RM8,401,756.85; and (ii) the remaining rentals for the three-year tenancy. In defence, the defendant argued that (i) the plaintiff had no *locus* to commence and maintain the action as it had assigned absolutely the tenancy agreement to its financier; (ii) unknown to the first defendant, there was a dispute between Orion and the plaintiff on the additional purchase price under the SPA. The first defendant was under the mistaken belief that the SPA was completed and the tenancy agreement had commenced, when in actual fact, they had not; and (iii) land searches revealed that the title for the land was for residential purpose. The first defendant counterclaimed, seeking, *inter alia*, (i) a declaration that the tenancy agreement had not commenced and the first defendant was not obliged to pay the monthly rent; (ii) in the alternative, a declaration that the tenancy agreement was void; and (iii) an order that the plaintiff pay to the first defendant RM9,411,062.50, being payment of rent received by the plaintiff. The High Court dismissed the plaintiff's claim and allowed the first defendant's counterclaim, on the grounds that (i) the plaintiff did not lack *locus standi* as the assignment of tenancy was not an absolute one but merely an assignment of security; (ii) the tenancy agreement was illegal as the contemplated use of the premises contravened the express condition of title for the land; (iii) the tenancy agreement was void and the plaintiff may not claim for the arrears in rental from the first defendant; (iv) the first defendant did not know of the contravention of the express condition of title at the time it entered into the tenancy agreement. Therefore, s. 66 of the Contracts Act 1950 applied as the tenancy agreement was a contract that was 'discovered to be void', entitling the first defendant to the return of the rental payments paid to the plaintiff; and (v) the plaintiff's claim against the second defendant, as the guarantor, was disallowed as a person could not claim a remedy under an illegal transaction.

The plaintiff appealed to the Court of Appeal against the decision of the High Court. The Court of Appeal allowed the appeal and the order of the High Court was set aside, based on the grounds that, *inter alia*, (i) in 2011, before the SPA between the plaintiff and Orion was signed, the previous proprietor, Kris Angsana, made a submission for surrender, re-alienation, amalgamation and conversion of land use from 'residential' to 'commercial' and 'mixed development' under s. 204D of the National Land Code ('the NLC'). The State Authority approved Kris Angsana's application pursuant to s. 204E of the NLC; (ii) Dewan Bandaraya Kuala Lumpur issued a certificate of fitness of occupation (CFO') for the said premises; and (iii) when the plaintiff and the first defendant entered into the tenancy agreement, the express condition had, for all intents and purposes, been changed from 'residential' to 'commercial' and 'mixed development'. Based on the above findings, the

Court of Appeal held that the tenancy agreement was valid and enforceable and proceeded to allow the plaintiff's claim and dismiss the first defendant's counterclaim. Hence, the present appeals by the defendants. The questions of law raised for the court's consideration were (i) whether an approval by the State Authority, given under s. 204D of the NLC, operates as an approval of land use under s. 124 of the NLC ('the first question'); (ii) whether change of condition of land under s. 124 of the NLC takes effect upon endorsement of the same on the issue document of title to the land in question ('the second question'); and (iii) whether a tenancy for commercial use of land, which was by condition for residential use, illegal and void, having regard to the decisions of the Federal Court in *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* ('the *Singma* case') and *Toh Huat Khay v. Lim A Chang* ('the *Toh Huat Khay* case') ('the third question').

Held (allowing appeals; setting aside orders of Court of Appeal and reinstating orders of High Court)

Per Zulkefli Ahmad Makinudin PCA (for the majority):

(1) The plaintiff contended that the approval granted in respect of the change of condition of land use was pursuant to s. 124 of the NLC. This was patently wrong. The application for change of condition of use of the land and the approval given was, in fact, pursuant to s. 204D of the NLC. The approval given under s. 204D of the NLC is quite different in its application and distinct from the approval sought and obtained under s. 124 of the NLC. The considerations are different. The provisions in s. 124 of the NLC relates to an application where the land proprietor applies to the State Authority to alter or change the category of land use. The provision in s. 124 of the NLC is only in respect of an application for a mere change in use of the land, which attracts different consideration and does not require the surrender of the issue document of title for destruction. By virtue of ss. 204E, 204F, 204G and 204H of the NLC, where there is an application for surrender, amalgamation and re-alienation with a change in category of use, there is a need to surrender the titles for the cancellation and re-issuance of a new title by the State Authority. The first question ought to be answered in the negative. (paras 6, 8, 11 & 16)

(2) The change on the condition of the land was only legally effective when the change of use was indorsed on the title as provided for under s. 124(7) of the NLC. Upon a proper interpretation of s. 124(4) read together with ss. 89 and 124(7) of the NLC and the principles in the *Toh Huat Khay* case and *Dr Ti Teow Siew & Ors v. Pendaftar Geran-geran Tanah Negeri Selangor*, the change of use will only become operative when the full premium is paid and the new condition of use is registered on the

title. The second question was answered in the affirmative. In any event, since the change of use in the instant case was not applied for under s. 124, but under s. 204D of the NLC, this issue appeared to be academic. (paras 17 & 19)

(3) The High Court had correctly applied the decision of the Federal Court in the *Singma* case. The Court of Appeal, on the other hand, erroneously refused to apply the *Singma* case by saying that, since the State Authority did not take any action against the proprietor of the land for the contravention pursuant to s. 128 of the NLC, the tenancy agreement was not unlawful. Although no action was taken by the State Authority in respect of the contravention, the tenancy agreement remained illegal for contravention. The Court of Appeal ought not to have considered the CFO issue as legitimising the illegality of the tenancy agreement. The third question should be answered in the affirmative. (paras 20-22)

Per Zainun Ali FCJ (dissenting):

(1) Looking at the entire s. 204 regimen, it is clear that it sets out how an application for surrender and re-alienation is to be made by a proprietor. In other words, s. 204 is a procedural regime. It is not the provision under which the State Authority grants the approval. Section 124 of the NLC, on the other hand, envisages the power of the State Authority in an application made by the proprietor to vary the conditions. This appeal fell under s. 124(1)(c) of the NLC. The first question resulted in the parties getting themselves into a knot and, therefore, required no answer because the question was flawed. The first question was rendered academic and would no longer determine the outcome of this case. (paras 96, 97, 99, 106 & 107)

Obiter:

(1) Once the State Authority approves the change of use under s. 124 of the NLC and the conditions of the approval, under s. 124(5) of the NLC, are satisfied, the change of use takes effect. Section 124 deals with conversion and, if it is approved, the effect will be to change the express conditions imposed on the land. Had the second question been necessary to dispose of the appeal, it would be answered in the negative. (para 115)

(2) The answer to the third question revolved around the proper interpretation of the decision in the *Singma* case. The proposition in the *Singma* case that a tenancy agreement is void for allowing the use of land in contravention of the express condition could only be said to extend to situations where the contravention is deliberate and could not be applied where approval prior to the agreement being entered into had been sought and obtained, especially where what was left to be done was

in the hands of the State Authority. In a similar fashion, the *Ton Huat Khay* case does not apply where approval from the State Authority has been obtained. In legal terms, this meant that the s. 204D application had been duly submitted without issue. All that was left to be done were that requirements of s. 204G, which properly construed, was a matter for the State Authority, apart from the notification by the proprietor. Where no alterations were made under s. 204E(2), the proprietor's notice to the State Authority is implied. (paras 122, 123 & 127)

Bahasa Malaysia *Headnotes*

Bellajade Sdn Bhd ('plaintif') ialah pemilik berdaftar sebuah bangunan pejabat ('premis tersebut'). Terdahulu, tanah tersebut dimiliki oleh Orion Choice Sdn Bhd ('Orion') dan sebelum itu, Kris Angsana Sdn Bhd ('Kris Angsana'). Pada 2013, plaintif memeterai satu perjanjian jual beli ('PJB') dengan CME Group Bhd ('defendan pertama') untuk tempoh tiga tahun dengan tujuan penggunaan komersial ('perjanjian sewaan'). Bawah perjanjian sewaan, (i) defendan pertama bersetuju menyewa premis tersebut daripada plaintif dengan sewa sebanyak RM1,018,750 sebulan dalam tempoh tiga tahun; dan (ii) pelaksanaan perjanjian sewaan dijamin oleh Tan Sri Dato' Lim Cheng Pow ('defendan kedua'). Apabila defendan pertama ingkar dalam bayaran sewa, plaintif memulakan tindakan terhadap defendan-defendan, menuntut (i) pengembalian sewa dan faedah, berjumlah RM8,401,756.85; dan (ii) baki sewa untuk sewaan tiga tahun. Dalam pembelaannya, defendan menghujahkan (i) plaintif tiada *locus* memulakan dan mengekalkan tindakan kerana telah menyerahhakan, secara mutlak, perjanjian sewaan kepada pembiayanya; (ii) tanpa diketahui oleh defendan pertama, wujud pertikaian antara Orion dan plaintif tentang harga belian tambahan bawah PJB. Defendan pertama, secara khilaf, percaya, PJB sempurna dan perjanjian sewaan sudah bermula, sedangkan tidak; dan (iii) carian-carian tanah mendedahkan hak milik tanah adalah demi tujuan kediaman. Defendan pertama menuntut balas, memohon, antara lain (i) satu pengisytiharan bahawa perjanjian sewaan belum bermula dan defendan pertama tidak wajib membayar sewa bulanan; (ii) secara alternatif, pengisytiharan bahawa perjanjian sewaan terbatal; dan (iii) satu perintah plaintif membayar RM9,411,062.50 kepada defendan pertama, iaitu bayaran sewa yang diterima oleh plaintif. Mahkamah Tinggi menolak tuntutan plaintif dan membenarkan tuntutan balas defendan pertama, atas alasan (i) plaintif mempunyai *locus standi* kerana penyerahhakan sewaan bukannya mutlak tetapi, sebaliknya, sekadar penyerahhakan cagaran; (ii) perjanjian sewaan tidak sah kerana penggunaan premis yang diniatkan melanggar syarat nyata hak milik tanah; (iii) perjanjian sewaan terbatal dan plaintif tidak boleh menuntut tunggakan sewaan daripada defendan pertama; (iv) defendan pertama tidak tahu tentang pelanggaran syarat nyata hak milik ketika

memeterai perjanjian sewaan. Oleh itu, s. 66 Akta Kontrak 1950 terpakai kerana perjanjian sewaan ialah kontrak yang 'didapati terbatal', melayakkan defendan pertama memperoleh pengembalian bayaran sewa yang dibayar kepada plaintif; dan (v) tuntutan plaintif terhadap defendan kedua, sebagai penjamin, tidak dibenarkan kerana seseorang tidak boleh menuntut remedi bawah transaksi tidak sah.

Plaintif merayu di Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi. Mahkamah Rayuan membenarkan rayuan dan perintah Mahkamah Tinggi diketepikan, berdasarkan alasan-alasan, antara lain, (i) pada 2011, sebelum PJB antara plaintif dan Orion ditandatangani, pemilik terdahulu, Kris Angsana, mengemukakan penyerahan, beri milik semula, penggabungan dan penukaran penggunaan tanah daripada 'kediaman' kepada 'komersial' dan 'pembangunan campur' bawah s. 204D Kanun Tanah Negara ('KTN'). Pihak Berkuasa Negeri membenarkan permohonan Kris Angsana bawah s. 204E KTN; (ii) Dewan Bandaraya Kuala Lumpur mengeluarkan perakuan kelayakan menduduki bangunan ('CFO') untuk premis tersebut; dan (iii) apabila plaintif dan defendan pertama memeterai perjanjian sewaan, syarat nyata telah, bagi maksud niat dan tujuan, ditukar daripada 'kediaman' menjadi 'komersial' dan 'pembangunan campur'. Berdasarkan dapatan-dapatan di atas, Mahkamah Rayuan memutuskan perjanjian sewaan sah dan berkuat kuasa dan seterusnya membenarkan tuntutan plaintif dan menolak tuntutan balas defendan pertama. Maka timbul rayuan ini oleh defendan-defendan. Soalan-soalan undang-undang yang dibangkitkan untuk pertimbangan mahkamah adalah (i) sama ada kelulusan Pihak Berkuasa Negeri, diberi bawah s. 204D KTN, beroperasi sebagai kelulusan penggunaan tanah bawah s. 124 KTN ('soalan pertama'); (ii) sama ada penukaran syarat tanah bawah s. 124 KTN berkuat kuasa melalui pengendorsannya pada dokumen hak milik keluaran tanah yang dipertikaikan ('soalan kedua'); dan (iii) sama ada sewaan tanah untuk penggunaan komersial, yang pada syaratnya untuk penggunaan kediaman, tidak sah dan terbatal, merujuk pada keputusan dan kes Mahkamah Persekutuan *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* ('kes *Singma*') dan *Toh Huat Khay v. Lim A Chang* ('kes *Toh Huat Khay*')('soalan ketiga').

Diputuskan (membenarkan rayuan-rayuan; mengetepikan perintah-perintah Mahkamah Rayuan dan menghidupkan perintah-perintah Mahkamah Tinggi)

Oleh Zulkefli Ahmad Makinundin PMR (majoriti):

(1) Plaintif menyatakan bahawa kelulusan diberi buat penukaran syarat penggunaan tanah bawah s. 124 KTN. Ini jelas salah. Permohonan penukaran syarat penggunaan tanah dan kelulusan yang diberi, sebenarnya, bawah s. 204D KTN. Kelulusan yang diberi bawah

s. 204D KTN agak berbeza permohonannya dan lain daripada kelulusan yang dipohon dan diperoleh bawah s. 124 KTN. Balasan-balasannya berbeza. Peruntukan dalam s. 124 KTN berkaitan permohonan apabila pemilik tanah memohon pada Pihak Berkuasa Negeri untuk meminda atau menukar kategori penggunaan tanah. Peruntukan dalam s. 124 KTN hanyalah berkenaan permohonan penukaran penggunaan tanah semata-mata, yang membangkitkan balasan berbeza dan tidak mensyaratkan penyerah dokumen keluaran hak milik untuk pelupusan. Berdasarkan ss. 204E, 204F, 204G dan 204H KTN, jika terdapat permohonan penyerahan, penggabungan dan beri milik semula dengan penukaran dalam kategori penggunaan, terdapat keperluan menyerahkan hak milik untuk pembatalan dan pengeluaran semula hak milik baru oleh Pihak Berkuasa Negeri. Soalan pertama wajar dijawab secara negatif.

(2) Pertukaran syarat tanah hanya berkuat kuasa apabila penukaran penggunaan tanah diindorskan pada hak milik, seperti yang diperuntukkan bawah s. 124(7) KTN. Selepas tafsiran wajar s. 124(4) dibaca bersama-sama dengan ss. 89 dan 124(7) KTN dan prinsip-prinsip dalam kes *Toh Huat Kha*y dan *Dr Ti Teow Siew & Ors v. Pendaftar Geran-geran Tanah Negeri Selangor*, pertukaran penggunaan hanya beroperasi apabila premium penuh dibayar dan syarat penggunaan baru pada hak milik didaftar. Soalan kedua dijawab secara afirmatif. Dalam apa-apa jua keadaan, oleh kerana penggunaan tanah dalam kes ini tidak dipohon bawah s. 124, tetapi bawah s. 204D KTN, isu ini menjadi akademik.

(3) Mahkamah Tinggi telah, dengan betul, mengguna pakai keputusan Mahkamah Tinggi dalam kes *Singma*. Mahkamah Rayuan, sebaliknya, terkhilaf apa enggan mengguna pakai kes *Singma* dengan mengatakan, oleh kerana Pihak Berkuasa Negeri tidak mengambil apa-apa tindakan terhadap pemilik tanah untuk pelanggaran, bawah s. 128 KTN, perjanjian sewaan tidak tidak sah. Walaupun tiada tindakan diambil oleh Pihak Berkuasa Negeri tentang pelanggaran, perjanjian sewaan kekal tidak sah atas sebab pelanggaran. Mahkamah Rayuan tidak sepatutnya mempertimbangkan isu CFO untuk mengesahkan ketaksahan perjanjian sewaan. Soalan ketiga sepatutnya dijawab secara afirmatif.

Oleh Zainun Ali HMP (menentang):

(1) Melihat pada keseluruhan rejimen s. 204, jelas bahawa seksyen ini memperuntukkan bagaimana permohonan penyerahan dan beri milik semula harus dibuat oleh pemilik. Dalam erti kata lain, s. 204 ialah rejim tatacara. Peruntukan ini bukan peruntukan yang bawahnya Pihak Berkuasa Negeri memberi kelulusan. Seksyen 124 KTN, sebaliknya, membayangkan kuasa Pihak Berkuasa Negeri dalam permohonan yang

dibuat oleh pemilik untuk mengubah syarat-syarat. Rayuan ini terjumlah bawah s. 124(1) KTN. Soalan pertama menyebabkan pihak-pihak terikat dan dengan itu, tidak memerlukan jawapan kerana soalannya cacat. Soalan pertama akademik dan tidak lagi menentukan keputusan kes ini.

Obiter:

(1) Apabila Pihak Berkuasa Negeri membenarkan penukaran penggunaan bawah s. 124 KTN dan syarat-syarat kelulusan, bawah s. 124(5) KTN, dipenuhi, pertukaran penggunaan berkuat kuasa. Seksyen 124 berurusan dengan pertukaran dan, jika diluluskan, kesannya ialah menukar syarat nyata yang dikenakan atas tanah. Jika soalan kedua wajib untuk melupuskan rayuan, soalan ini akan dijawab secara negatif.

(2) Jawapan untuk soalan ketiga adalah sekitar tafsiran wajar keputusan dalam kes *Singma*. Cadangan dalam kes *Singma* bahawa satu perjanjian sewaan terbatal kerana membenarkan penggunaan tanah bertentangan dengan syarat nyata hanya boleh dikatakan terpakai pada situasi-situasi apabila pelanggarannya sengaja dan tidak boleh diguna pakai iaitu apabila kelulusan sebelum perjanjian dimeterai telah dipohon dan diperoleh, khususnya apabila yang tinggal untuk dilakukan berada dalam tangan Pihak Berkuasa Negeri. Dalam cara yang sama kes *Ton Huat Khay* tidak terpakai apabila kelulusan Pihak Berkuasa Negeri sudah diperoleh. Dalam terma perundangan, ini bermaksud permohonan bawah s. 204 telah dikemukakan tanpa apa-apa isu. Yang tinggal untuk dilakukan cumalah syarat-syarat s. 204G, yang jika ditafsir, adalah hal perkara Pihak Berkuasa Negeri, selain makluman oleh pemilik. Jika tiada perubahan dibuat bawah s. 204E(2), notis pemilik kepada Pihak Berkuasa Negeri disiratkan.

Case(s) referred to:

Ahmad Udoh & Anor v. Ng Aik Chong [1969] 1 LNS 4 HC ***(refd)***

Dr Ti Teow Siew & Ors v. Pendaftar Geran-Geran Tanah, Selangor [1981] CLJ 134A; [1981] CLJ (Rep) 142 HC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd [1979] 1 LNS 96 FC ***(refd)***

Toh Huat Khay v. Lim A Chang [2010] 7 CLJ 261 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 24, 66

National Land Code, ss. 76, 78(3), 79(2)(g), 89, 113(a), 124(1)(a), (b), (ba), (c), (2), (3), (4)(a), (b), (c), (5), (7), 124A, 127, 128, 129, 135, 136, 137, 138, 139, 140, 141, 141A, 142, 143, 143A, 144, 145, 146, 147, 148, 149, 150, 197, 200, 204A, 204B, 204C(1)(a), 204D(3), 204E(1), (2), (4), 204F, 204G(1), (2), 204GA, 204H

For the 1st appellant - Gopal Sri Ram, KY Sim & David Yii; M/s KY Sim & Co
For the 2nd appellant - K Kirubakaran & Desmond Ng; M/s Shui-Tai
For the respondent - M Pathmanathan, Michele Kaur, Shanti Pathmanathan & Shireen Pathmanathan; M/s Sun & Michele

[Editor's note: For the Court of Appeal judgment, please see Bellajade Sdn Bhd v. CME Group Bhd & Anor [2017] 1 CLJ 43 (overulled);
For the High Court judgment [2015] 7 CLJ 343 (reinstated).]

Reported by Najib Tamby

JUDGMENT

Zulkefli Ahmad Makinudin PCA (majority):

Introduction

[1] These are two appeals by the two respective appellants against the decision of the Court of Appeal which allowed the appeal by the respondent against the decision of the High Court. In the High Court, the first appellant, CME Group Berhad was the first defendant and the second appellant, Tan Sri Dato' Lim Cheng Pow, was the second defendant. The respondent, Bellajade Sdn Bhd, was the plaintiff before the High Court. The parties will be referred to in this judgment as they were before the High Court.

[2] This court had granted leave to appeal against the decision of the Court of Appeal on the following questions of law:

(i) Whether an approval by the State Authority given under s. 204D of the National Land Code ("NLC") operates as an approval of land use under s. 124 of the NLC?

(ii) Whether change of condition of land under s. 124 of NLC takes effect upon endorsement of the same on the issue document of title to the land in question?

(iii) Whether a tenancy for commercial use of land which is by condition for residential use is illegal and void having regard to the decisions of the Federal Court in *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1979] 1 LNS 96; [1980] 1 MLJ 21 and *Toh Huat Khay v. Lim A Chang* [2010] 7 CLJ 261; [2010] 4 MLJ 312.

Background Facts

[3] The relevant background facts of the case are as follows:

(i) The plaintiff is the registered owner of a 23-storey office building together with four levels of basement consisting of 453 car parking bays and 46 motorcycle parking bays called Plaza Palas located in Lorong Palas, off Jalan Ampang, Kuala Lumpur (the said premises).

(ii) Previously, the plaintiff had purchased the land from one Orion Choice Sdn Bhd ("Orion" – not a party in this proceeding) and the sale and purchase agreement ("SPA") was completed on 20 February 2013. On 21 February 2013, the plaintiff entered into a tenancy agreement with the first defendant for a term of three years ("tenancy agreement). The owner of the land prior to Orion was Kris Angsana Sdn Bhd ("Kris Angsana").

(iii) Pursuant to the tenancy agreement, the first defendant agreed to rent from the plaintiff the said premises at a rental of RM1,018,750 per month for a fixed term of three years commencing from the date of completion of the sale and purchase agreement. Under the terms of the tenancy agreement, the first defendant was deemed to have taken possession of the said premises upon completion of the SPA. The performance of the tenancy agreement was guaranteed by the second defendant pursuant to a guarantee of tenancy agreement executed on the same day as the tenancy agreement.

(iv) The premises were tenanted to the first defendant for commercial use as follows;

> Lounge, private club, recreational bistro, convenient shop, café, hair saloon, fitness centre, clinic, laundry, beauty salon, florist, banking services and facilities, food court, fast food outlets and office. (section H of the First Schedule of the Tenancy Agreement)

(v) The first defendant entered into possession of the said premises on 21 February 2013 and paid rental for only six months amounting to RM6,110,100. The first defendant failed and defaulted in the payment of rental for the period beginning May 2013.

(vi) The plaintiff then filed this suit against the first defendant and the second defendant seeking recovery of rentals and interest, totaling RM8,401,756.85. The plaintiff also claimed rentals for the remainder of the three year tenancy.

(vii) The first defendant's defence was that the plaintiff had by an assignment dated 1 November 2013 assigned absolutely the tenancy agreement to its financier, OCBC Bank (Malaysia) Berhad, and thus has no *locus* to commence and maintain the action.

(viii) It was also pleaded by the first and second defendants that since there was dispute between Orion and the plaintiff on the additional purchase price payable under the SPA, not known to the first defendant, the first defendant was under the mistaken belief that the SPA was completed and the tenancy agreement had commenced, when in fact the SPA was not completed and the tenancy agreement had not commenced.

(iv) The first and second defendants pointed out that land searches over the subject properties were obtained on 28 October 2013 which revealed that the express condition of title for the lands on which the subject properties were located was for residential as follows:

> Tanah yang dimaksudkan hendaklah digunakan semata-mata untuk nunah kediaman.

(x) The first defendant counter-claimed, seeking, *inter alia*:

(a) a declaration that the said tenancy agreement has not commenced and the first defendant is not obliged to pay the monthly rent;

(b) in the alternative, a declaration that the said tenancy agreement is void;

(c) an order that the plaintiff pays to the first defendant the said sums of RM9,411,062.50, being payment of rent which had been received by the plaintiff.

Findings Of The High Court

[4] The High Court dismissed the plaintiff's claim and allowed the first defendant's counter-claim. The findings of the learned Judicial Commissioner ("JC") of the High Court are summarised as follows:

(a) the assignment of tenancy was, on its true construction, not an absolute assignment of the tenancy agreement, but merely an assignment by way of security. Therefore, the plaintiff did not lack *locus* to prosecute the claim;

(b) the tenancy agreement was illegal on the basis that the contemplated use of the premises contravened the express condition of title for the land. The tenancy agreement was accordingly void, and the plaintiff may not claim for the arrears in rental from the first defendant;

(c) the court found as a matter of fact that the first defendant did not know of the contravention of the express condition of title at the time it entered into the tenancy agreement. Therefore, s. 66 of the Contracts Act 1950 ("the Act") applies, in that the tenancy agreement was a contract that was "discovered to be void" within the meaning of s. 66 of the Act. The first defendant may therefore claim for the return of the rental payments previously made to the plaintiff;

(d) the guarantee was, on its true construction, a contract of guarantee and indemnity. As such, the guarantor undertook obligations as principal *vis-a-vis* the plaintiff. The obligations of the guarantor accordingly remained extant notwithstanding that the tenancy agreement was found to be void.

However, based on the principle that the courts will not permit a person to claim a remedy under an illegal transaction in which he has participated, the plaintiff's claim against the guarantor was disallowed.

Findings Of The Court Of Appeal

[5] The plaintiff appealed to the Court of Appeal against the decision of the High Court. The appeal was allowed and the order of the High Court was set aside. The tenancy agreement was held to be valid and enforceable. The plaintiff's claim against both the defendants was allowed and the first defendant's counter-claim was accordingly dismissed. The Court of Appeal *inter alia* made the following findings:

(a) The previous proprietor, Kris Angsana had on 1 December 2011 made submission for surrender, re-alienation, amalgamation and conversion of land use from residential to commercial under s. 204D of the NLC. This was before the SPA between the plaintiff and Orion was signed. On 8 May 2012 the State Authority for Wilayah Persekutuan approved the registered proprietor's (Kris Angsana) application for the "surrender, re-alienation, amalgamation and conversion of land use" pursuant to s. 204E of the NLC. The change of use thereof was to "commercial" and "mixed development" from "residential."

(b) On 27 November 2012 Dewan Bandaraya Kuala Lumpur (DBKL) issued the certificate of fitness of occupation (CFO) for the said premises and on 18 February 2013, upon payment of the full premium of RM1,531,179 on 14 February 2013, the Pengarah Tanah dan Galian, Wilayah Persekutuan Kuala Lumpur (PTG) issued the "Sijil Pengesahan Kelulusan Permohonan" to reconfirm the State Authority's approval of the change of use under s. 124 and subdivision and re-alienation under ss. 124A, 137, 142, 148, 197, 200 and 204D of the NLC.

(c) On 21 February 2013, the plaintiff and the first defendant entered into the tenancy agreement for a three-year term. Thus, at the time the plaintiff entered into the tenancy agreement with the first defendant or rather at the inception of the tenancy agreement, the express condition had for all intents and purposes been changed from residential to "commercial' and "mixed development". What remained pending was merely the administrative process of endorsing the State Authority's approval on the new titles.

(d) Even if the court were to agree with the learned JC and find the tenancy agreement illegal and void *ab initio*, the court was of the view that the learned JC's finding that the first defendant did not know of the contravention of the express condition at the time it entered into the tenancy agreement was, on the facts, erroneous.

(e) The solicitors for the first defendant in the tenancy agreement, Messrs Faizah, Lim & Associates, had earlier acted as solicitors for Orion in the SPA between Orion and the plaintiff. The solicitors' awareness of the condition on the land, and the application for conversion thereof, is evident from their letters dated 14 February 2013 and 19 February 2013, respectively, enclosing the payment receipt for the premium for conversion and the certificate of approval (Sijil Pengesahan Kelulusan) by the State Authority. The tenancy agreement was only subsequently entered into by the parties on 21 February 2013. As solicitors, Messrs Faizah, Lim & Associates could not have been ignorant of the fact that the use of the said premises as contemplated by the tenancy agreement was in contravention of the express condition.

Decision Of This Court

[6] I shall first deal with the first question of law posed in this appeal. It was contended for the plaintiff that the approval granted in respect of the change of condition of land use was pursuant to s. 124 of the NLC. With respect it is my considered view this is patently wrong. The application for change of condition of use of the land and the approval given was in fact pursuant to s. 204D of the NLC. This undisputed fact can be gleaned from the following documents:

(a) Recital F of the sales and purchase agreement between Orion and the plaintiff.

(b) the letter dated 5 September 2013 from the Pejabat Tanah dan Galian Kuala Lumpur ("KLPTG") to Kris Angsana, the then registered proprietor, confirming the approval for surrender and re-alienation of the said lands pursuant to s. 204D of the NLC.

[7] Section 204D of the NLC states as follows:

Applications for approval of surrender and re-alienation

204D (1) Any application for approval by a proprietor wishing to surrender his title or titles under this Part shall be made in writing to the Land Administrator in Form 12D and shall be accompanied by:

(a) such fees as may be prescribed;

(b) all such written consents to the making thereof as are required under paragraph 204C(1)(e);

(c) a plan showing the lot or lots to be surrendered and a pre-computation plan showing the details of the portions and units to be re-alienated, together with such number of copies thereof as may be prescribed or, in the absence of any such prescription, as the Land Administrator may require;

(d) a copy of the layout plan, as approved by the appropriate authority, in respect of the said lot or lots, showing the portions and units to be re-alienated; and

(e) the issue document of title to the land, unless the proprietor declares that it is for any reason incapable of production.

(2) Where the proprietor is unable to produce the issue document of title for the reason that it is in the possession or control of any person or body, the application shall be accompanied by a sworn statement of the proprietor to that effect, and there shall be exhibited thereto a copy of a notice by the proprietor to that person or body requiring the production of the said document to the Land Administrator within fourteen days of the date of the service thereof on such person or body, and also the proof of service of such notice.

(3) Upon receipt of the application, the Land Administrator shall endorse, or cause to be endorsed, a note thereof on the register document of title to the land.

[8] I am of the view that the provisions in s. 124 of the NLC is quite different in its application from the provisions in s. 204D of the NLC. Section 124 of the NLC relates to an application where the land proprietor applies to the State Authority to alter or change the category of land use. (See s. 124 of the NLC). Where there is an application for surrender, amalgamation and re-alienation with a change in category of use, there is a need to surrender the titles for the cancellation and re-issuance of a new title by the State Authority. (See ss. 204E, 204F, 204G and 204H of the NLC).

[9] It is to be noted that when re-alienating the land subsequent to an approval by the State Authority pursuant to s. 204D of the NLC, the registered proprietor accepts the provision contained in s. 79(2) of the NLC. (See ss. 204G and s. 79 of the NLC). When the land, subsequent to the surrender and amalgamation is to be re-alienated, then the provisions in s. 78 of the NLC will apply. Section 78 of the NLC provides as follows:

How alienation is effected

78 (1) The alienation of State land under final title shall be effected in accordance with the provisions of Chapter 3.

(2) The alienation of State land under qualified title shall be effected in accordance with the provisions of Chapter 2 of Part Eleven.

(3) The alienation of State land shall take effect upon the registration of a register document of title thereto pursuant to the provisions referred to in subsection (1) or (2), as the case may be; and notwithstanding that its alienation has been approved by the State Authority, the land shall remain State land until that time.

[10] The relevant provisions in the NLC for applications for the surrender and re-alienation of land are as follows:

(i) The provisions in s. 124 of the NLC are not affected by the provisions relating to surrender and re-alienation. (See s. 204A of the NLC).

(ii) Upon receipt of an application under s. 204D of the NLC, the Land Administrator is required to endorse, or cause to be endorsed a note thereof in the register document of title to the land. (See sub-s. 204D(3) of the NLC).

(iii) On approving the application under s. 204D of the NLC, the State Authority shall also determine matters in sub-s. 79(2) of the NLC which include the imposition of express conditions. (See sub-s. 204E(4) and para. 79(2)(g) of the NLC).

(iv) The provisions of s. 79 in relation to the alienation of State land shall also apply to the re-alienation of land as if the land had already become State land (see sub-s. 204E(4) of the NLC).

[11] It is my view that the provision in s. 124 of the NLC is only in respect of an application for a mere change in use of the land, which attracts different consideration and does not require the surrender of the issue document of title for destruction. Where a change of use is approved under s. 124 of the NLC, that change of use must be reflected in the same issue of document of title for it to become effective (see s. 124(7) of the NLC).

[12] It is noted that the learned judges of the Court of Appeal in the present case whilst acknowledging that the application in the instant case was for surrender, re-alienation, amalgamation and change of use under s. 204D of the NLC went on to deal with the provision of s. 124 of the NLC and the cases dealing with s. 124 of the NLC. In fact the learned judges of the Court of Appeal went on to erroneously state as follows:

> [73] We are here concerned with applications for change of use under section 124(4) of the NLC, and when it takes effect under that section. Consequently section 78(3) and the cases of *North East Plantation* and *Yap Chong Lan* are no applicable to the present case.

[13] I am of the view that where there is a surrender, amalgamation and re-alienation, such as in the instant appeal, then the provisions in sub-s. 78(3) of the NLC applies. That subsection states:

> (3) The alienation of State land shall take effect upon the registration of a register document of title thereto pursuant to the provisions referred to in sub-section (1) or (2), as the case may be; and, notwithstanding that its alienation has been approved by the State Authority, the land shall remain State land until that time.

[14] On the application of sub-s. 78(3) of the NLC in the case of *Dr. Ti Teow Siew & Ors. v. Pendaftar Geran-Geran Tanah, Selangor* [1981] CLJ 134A; [1981] CLJ (Rep) 142; [1982] 1 MLJ 38 at 39, Hashim Yeop Sani J (as His Lordship then was) had this to say:

> Looking at the second limb of section 78(3) of the Code it seems clear to me that the restriction in interest could not have commenced before the date of registration because the land remained State land and the restriction could not have meant to operate on the State authority." (See also the case of *North East Plantation Sdn. Bhd. v. Pentadhir Tanah Daerah Dunjun & Anor.* [2011] 2 CLJ 392).

[15] It is my considered view that the change of use to "pembangunan bercampur bagi tujuan pangsapuri dan pejabat sahaja" (as stated in the KLPTG's letter dated 5 September 2013) will be endorsed on the new title and become effective upon the registration and issuance of a new issue document of title pursuant to sub-s. 78(3) of the NLC. On this point, the learned judges of the Court of Appeal fell into an error of law when they said:

> [71] The defendant's reliance on section 78(3) of the NLC and the cases of *North East Plantations Sdn. Bhd v. Pentadbir Tanah Daerah Dunqun & Anor.* [2011] 2 CLJ 392 and *State of Negeri Sembilan v. Yap Chong Lan & Ors. & Another Case* [1984] 1 CLJ (Rep) 144 is in our view misplaced.
>
> [72] Those 2 cases deal with alienation of state land by the State Authority and when it takes effect, whether upon approval by the State Authority or upon registration. As expressly provided for by section 78(3) of the NLC, alienation clearly takes effect only upon registration.
>
> [73] We are here concerned with applications for change of use under section 124(4) of the NLC, and when it takes effect under that section. Consequently section 78(3) and the cases of *North East Plantation* and *Yap Chong Lan* are not applicable to the present case.

[16] In the circumstances of this case, the first question ought to be answered in the negative. The approval given under s. 204D of the NLC is quite different in its application and distinct from the approval sought and obtained under s. 124 of the NLC. The considerations are different.

[17] I shall now deal with the second question of law posed in this appeal. I am of the view that the change on the condition of the land is only legally effective when the change of use is indorsed on the title as provided for under sub-s. 124(7) of the NLC. On this point, in the case of *Toh Huat Khay v. Lim A Chang* [2010] 7 CLJ 261; [2010] 4 MLJ 312 at p. 273 (CLJ); p. 322 (MLJ), the Federal Court had this to say:

> If at all the state authority had approved the transfer of the said land, the land administrator, pursuant to section 124(7) of the Code shall have to sign a memorandum in Form 7C in accordance with at the direction of the state authority and shall present the same and on the memorial thereof being made, the registrar shall make an entry on the register and issue document of title to the said land shall note the date thereof and the authority thereof, and authenticate the same under this hand and seal. These are mandatory statutory requirements under the Code which have to be adhered to before the said land can be transferred. I am of the view that it cannot be implied that such requirements have been complied with based merely on the said letter from the director of land and mines. (See also the case of *Dr. Ti Teow Siew & Ors. v. Pendaftar Geran-Geran Tanah Negeri Selangor* [1982] 1 MLJ 38).

[18] It is noted that in the present case, the learned judges of the Court of Appeal declined to follow *Toh Huat Khay* and *Dr. Ti Teow Siew* but instead preferred to follow the case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135.

[19] It is my judgment that upon a proper interpretation of sub-s. 124(4) of the NLC read together with sub-s. 124(7) of the NLC and s. 89 of the NLC and with the benefit of the principles laid down in *Toh Huat Khay* and *Dr. Ti Teow Siew*, the change of use will only become operative when the full premium is paid and the new condition of use is registered on the title. The second question posed in this appeal is therefore answered in the affirmative. In any event, since the change of use in the instant case was not applied for under s. 124 of the NLC but under s. 204D of the NLC, I take the view that this issue appears to be academic.

[20] I shall now deal with the third question of law posed in this appeal. I am of the view that the High Court had correctly applied the decision of the Federal Court in *Singma Sawmill Co. Sdn. Bhd. v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1979] 1 LNS 96; [1980] 1 MLJ 21 in coming to its decision when the learned JC said:

> [24] The facts of *Singma Sawmill Co. Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 23 are directly on point to the issues at hand. In this case, the plaintiff sought to recover arrears of rent from the defendant tenant, who had been let a portion of the plaintiff's land 'solely for the purpose of operating a factory'. The defendant ceased to pay rental upon being warned by a representative of the Industrial Development Department of the government of the State of Johore that its factory was operating illegally and in breach of an express condition of title. The land in question was agricultural land and was subject to an express condition that it was to be used for the cultivation of pineapple and rubber. The

court made a finding of fact that the defendant was not aware of the express condition at the time it entered into the tenancy agreement and only found out about it when it was warned by the authorities.

[25] The Federal Court in this case affirmed the decision of the trial judge, who held that the plaintiff was guilty of giving an illegal consideration to the tenancy agreement and as such the contract was void under section 24 of the Contracts Act 1950.

[26] Counsel for Bellajade sought to distinguish the facts of the present case on the basis that:

(a) Dewan Bandaraya Kuala Lumpur had already issued the certificate of fitness for occupant in respect of the premises;

(b) the process of conversion of the category of land use had already commenced and part of the conversion premium had been paid.

[27] In my judgment, the fact that the certificate of fitness for occupation had already been issued has no bearing on the express condition of title. In addition, the fact that the process of conversion had been commenced did not change the fact that the express condition of title prohibited the use of the building for the purposes specified in section H of Schedule 1 of the Tenancy Agreement. It is clear that these purposes contemplated the ability of CME to use the premises for commercial purposes and to sub-let portions of the premises to businesses and retailers, which would not come within the category of "kediaman" or "residential".

[21] The Court of Appeal in the present case erroneously refused to apply the case of *Singma Sawmill Sdn Bhd* when they said that since the State Authority did not take any action against the proprietor of the land for the contravention pursuant to s. 128 of the NLC, the tenancy agreement was not unlawful. With respect it is my judgment that although no action was taken by the State Authority in respect of the contravention, the tenancy agreement nonetheless remains illegal for contravention. The Court of Appeal ought not to have considered the certificate of fitness for occupation ("CFO") issue as legitimising the illegality of the tenancy agreement.

[22] The learned High Court JC had rightly found that the CFO has no bearing on the express condition of title to the land. The learned judges of the Court of Appeal however had erroneously clothed the tenancy agreement with legality by reason of the issuance of the CFO by the Dewan Bandaraya on 27 November 2012. The third question posed in this appeal in the circumstances of the case should be answered in the affirmative.

Whether The First Defendant Had Knowledge Of The Contravention Of The Express Condition Of The Land At The Time It Entered The Tenancy Agreement

[23] The learned judges of the Court of Appeal in their judgment appeared to have considered the issue as to whether the defendants in the present case was aware of the illegality at the time when the agreement was entered into with the plaintiff. On this point the provision of s. 66 of the Contracts Act 1950 ("CA") was referred. Section 66 provides as follows:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, tote person whom he received.

[24] In order to invoke s. 66 of the CA, the invalidity of the agreement should be discovered subsequent to its making and it only applies where a party enters into an agreement under the belief that it was legal, and not where the illegality was known from the beginning. (See *Ahmad Udoh & Anor v. Ng Aik Chong* [1969] 1 LNS 4; [1969] 2 MLJ 116).

[25] In the present case, the Court of Appeal took the view that the solicitors for the first defendant in the tenancy agreement, Messrs Faizah, Lim & Associates, had earlier acted as solicitors for Orion in the SPA between Orion and the plaintiff. It was contended that as solicitors, Messrs Faizah, Lim & Associates could not have been ignorant of the fact that the use of the said premises as contemplated by the tenancy agreement was in contravention of the express condition of the land. The Court of Appeal went on to state that knowledge of the solicitor is regarded by law as the knowledge of the client, except where the solicitor had acted fraudulently.

[26] The Court of Appeal concluded on this issue that constructive knowledge of the breach of the express condition, at the time the tenancy agreement was entered into, can be imputed upon the first defendant, thus rendering the first defendant in *pari delicto*. As such, the first defendant is precluded from seeking recourse by virtue of restitution under s. 66 of the CA.

[27] With respect, I could not agree with the findings of the Court of Appeal on this issue of the first defendant having knowledge of the contravention of the express condition of the status of the land at the time it entered the tenancy agreement for the reasons set out below.

[28] It should be noted that the plaintiff did not plead in the reply and defence to the counterclaim that the first defendant knew that the permitted use in the tenancy agreement was a contravention of land use prescribed on the title. It was not the plaintiff's pleaded case that the first defendant was in *pari delicto* with the plaintiff in the illegality of the tenancy agreement.

[29] It is also to be noted that in fact during oral arguments before the learned JC, learned counsel for the plaintiff conceded that the first defendant did not know of the illegality of the tenancy agreement. This was what the court had asked and the answer from learned counsel for the plaintiff reproduced as follows:

Court:	so we have a situation where the CME had entered into a Tenancy Agreement. It appears not to have any notice of the fact the condition of land use right, is residential, and it appears as though it is a contravention of an express condition of title. They entered into the Tenancy and it appears that they only subsequently found out.
Plaintiff Counsel:	Yes.
Court:	I understand that, Faizal, Lim & Associates did also act for the first defendant.
Plaintiff Counsel:	For a short while in February.
Court:	In fact they are not obligated from informing the first defendant. In fact the obligation of confidentiality would prohibit them from informing another client of matters relating to another client, right?
Plaintiff Counsel:	Yes.
Court:	So there is no question at all. It appears as there is no question to all that at least there is no evidence before me right, that can lead me to the conclusion that the first defendant knew at the time which it signed the Tenancy Agreement that there was an express condition of title that would contravene the stated aim of the Tenancy Agreement.
Plaintiff Counsel:	Yes My Lord.

(See pp. 1645 to 1646 of additional appeal record).

[30] The High Court therefore found that the first defendant did not know about the express condition at the time it entered into the tenancy agreement and that the first defendant was not aware prior to conducting the land searches that the use of the premises as contemplated by the tenancy agreement contravened the express condition of title.

[31] It is my judgment that the Court of Appeal erroneously substituted these findings with the alleged constructive notice imputed to the first defendant through its solicitors. In doing so, the Court of Appeal erroneously took into cognizance the following:

(a) Messrs Faizah, Lim & Associates ("the firm") were the solicitors for the first defendant in the tenancy agreement despite there being no evidence of the same;

(b) The firm was also the solicitors for Orion in the plaintiff's SPA with Orion; and

(c) The firm was aware of the application for conversion of the condition of the said land as evident from their letters dated 14 February 2013 and 19 February 2013.

[32] It is also noted that the letter dated 14 February 2013 is nowhere to be found in the appeal record of the Court of Appeal. The letter dated 19 February 2013 on the other hand came up for the first time when it was introduced by learned counsel for the plaintiff in the plaintiff's written submissions dated 8 January 2016. (See pp. 1346 to 1354 of appeal record-C-6/7).

[33] With respect, I am of the view the Court of Appeal ought not have substituted finding of facts that were neither pleaded nor put to the first defendant's witnesses during cross-examination. Parties are bound by their pleadings and unpleaded issues cannot be argued and decided upon. It is an established principle of law that an appellate court will only intervene if the decision of the lower court is "plainly wrong". (See the case of *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1). In the present case, it is my considered view that the Court of Appeal failed in exercising its powers of appellate intervention in reversing the findings of the learned JC. In the circumstances of this case, the plaintiff had not proved its case on the balance of probabilities against the defendants.

Conclusion

[34] For the reasons above-stated, I allow the appeals by both the first and second defendants with costs. The orders of the Court of Appeal are hereby set aside and the orders of the High Court are reinstated. The deposit is to be refunded to the defendants.

Zainun Ali FCJ (dissenting):

Introduction

[35] Appeal No: 02-135-11-2017 (W) ("Appeal 135") and Appeal No: 02-136-11-2017 (W) ("Appeal 136") arose from the same action in the High Court.

[36] At the High Court, the respondent, Bellajade Sdn Bhd ("Bellajade")' filed an action for recovery of rental under a tenancy agreement dated 21 February 2013 ("the tenancy agreement"). The appellant in Appeal 136,

CME Group Berhad ("CME") was the tenant whilst the appellant in Appeal 135, Tan Sri Dato' Lim Cheng Pow ("the guarantor") stood as guarantor to the tenancy agreement.

[37] On 20 May 2015, the High Court dismissed the respondent's claim on the ground that the tenancy agreement was illegal and void *ab initio* as the commercial use of the premises contemplated under the agreement contravened the express condition of title which restricted the use of the lands to residential only. The learned Judicial Commissioner ("JC") found that the application made for land development under s. 204D of the National Land Code (NLC) for the purpose of changing the express condition of the lands from residential to mixed development had not been completed. The approval granted by the State Authority in respect of the change had yet to be endorsed on the documents of title.

[38] On appeal, the Court of Appeal reversed the finding of the trial judge. The court found that the tenancy agreement was not void for illegality. The process of conversion had been completed upon payment of the premium sum imposed by the State Authority for the change of condition. The court was of the view that sub-s. 124(4) of the NLC does not contemplate that an application for a change of an express condition to a land is effective only upon an endorsement made on the documents of title.

[39] On 13 November 2017, the appellants in both appeals were granted leave of this court to appeal the decision of the Court of Appeal dated 24 August 2016 on the following questions:

Questions Of Law

(i) Whether an approval by the State Authority given under s. 204D of National Land Code ("NLC") operates as an approval of land use under s. 124 of the NLC?

(ii) Whether change of condition of land under s. 124 of the NLC take effect upon endorsement of the same on the issue document of title to the land in question?

(iii) Whether a tenancy for commercial use of land which is by condition for residential use is illegal and void having regard to the decisions of the Federal Court in *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1979] 1 LNS 96; [1980] 1 MLJ 21 and *Toh Huat Khay v. Lim Ah Chang* [2010] 7 CLJ 261; [2010] 4 MLJ 312.

A

Facts

[40] Bellajade is the registered owner of a 23-storey office building together with four levels of basement consisting of 453 car parking bays and 46 motorcycle parking bays called Plaza Palas located in Lorong Palas, off Jalan Ampang, Kuala Lumpur ("the premises").

B

[41] The premises is located on nine pieces of lands known as GM 2045 for Lot 45, GM 35 for Lot 50, GM 36 for Lot 51, G37 for Lot 52, Geran 539 for Lot 57, Geran 540 for Lot 58, GM2402 for Lot 90 and Geran 29727 for Lot 93 all in section 88, Town of Kuala Lumpur ('the lands").

C

[42] The lands consist of the premises (Block A- commercial building) and a service apartment (Block B).

[43] The premises, was purchased by Bellajade from one, Orion Choice Sdn Bhd ("Orion") *vide* sale and purchase agreement dated 26 March 2012 ("the SPA"). Orion however retained proprietorship of the service

D

apartment.

[44] Orion was the beneficial owner of the lands. Orion had purchased the lands from the original proprietor, Kris Angsana Sdn Bhd ("Kris Angsana").

[45] The SPA between Bellajade and Orion in respect of the premises was

E

completed on 20 February 2013. An arrangement was made by Orion for CME to rent the premises from Bellajade and to execute the tenancy agreement simultaneously with the execution of the SPA.

[46] As a result, on 21 February 2013, Bellajade entered into a tenancy agreement with CME ("the tenancy agreement"). The latter agreed to rent

F

Plaza Palas at a rental of RM1,018,750 per month. Based on section E of the First Schedule to the tenancy agreement, the tenancy was for a term of three years commencing from the completion of the SPA between Orion and Bellajade.

[47] The performance of the tenancy agreement was guaranteed by the

G

guarantor pursuant to a guarantee of tenancy agreement executed on the same date as the tenancy agreement.

[48] The premises was being let by CME for commercial purposes as specified in section H of Schedule 1 of the tenancy agreement namely:

H

> Lounge, private club, recreational premises and entertainment/ recreational bistro, convenient shop, café, hair saloon, fitness centre, clinic, laundry, beauty saloon, florist, banking services and facilities, food court, fast food outlets and office.

I

[49] The titles of the lands were endorsed with an express condition restricting the use of the land for residential only. On 22 November 2011, the original proprietor, Kris Angsana applied to the Land Administrator of Kuala Lumpur for the surrender and re-alienation of the lands under s. 204D of the NLC, with a view to changing the express condition of the lands from residential to mixed development. Pursuant thereto, the following events took place:

(i) By a letter dated 9 May 2012, the Land Administrator of Kuala Lumpur notified Kris Angsana that on 8 May 2012, the State Authority had approved Kris Angsana's application for surrender and re-alienation of the lands and the change in the express condition of the lands to "Pembangunan bercampur bagi tujuan pangsapuri dan pejabat sahaja" (mixed development).

(ii) It is stated in the letter dated 9 May 2012, that the approval of the State Authority was subject to the conditions stipulated in the said letter. Among others, Kris Angsana was required to make a total payment of RM1,550,172 comprising RM1,531,179 being the amount of premium payable for the change of use, RM18,873 being the first year assessment rate and RM120 for the preparation of title to the lands.

(iii) On 14 February 2013, Kris Angsana paid the full premium of RM1,531,179.

(iv) On 18 February 2013 Pengarah Tanah dan Galian, Wilayah Persekutuan Kuala Lumpur ('PTG') issued a certificate; "Sijil Pengesahan Kelulusan Permohonan Di Bawah Seksyen 124, 124A, 137, 142, 148, 197, 200 Atau 204D Kanun Tanah Negara, 1965". The certificate acknowledged payment of the premium sum. The approval of the State Authority on the s. 204D application was stated in the following terms:

> Pihak Berkuasa Negeri telah meluluskan permohonan yang dikemukakan di bawah seksyen 204D Kanun Tanah Negara daripada pemilik tanah Kris Angsana Sdn Bhd.

(v) Meanwhile, on 27 November 2012 Dewan Bandaraya Kuala Lumpur ("DBKL") issued a certificate of fitness of occupation ("CFO") for the premises. The CFO was for the premises and the adjacent service apartment.

[50] CME entered into possession of the premises on 21 February 2013 and paid rental for only six months amounting to RM6,110,100. CME defaulted in the payment of rental for the period beginning May 2013.

[51] On 5 September 2013 ie, some seven months after the commencement of the tenancy agreement, the Land Administrator of Kuala Lumpur sent a letter to Kris Angsana confirming the State Authority's approval dated 8 May 2012 but purported to increase the premium to RM5,341,322.10 ie, increasing the premium by RM3,810,143.10 ("the letter of increase in premium"). Kris Angsana appealed to the State Authority against the imposition of the additional premium.

Action Filed By Bellajade

[52] On 21 January 2014, Bellajade filed an action against CME and the guarantor seeking recovery of rentals. Bellajade claimed for a sum of RM8,401,756.85 being the overdue rentals and interest at the time of filing of the action and rentals for the remainder of the three year tenancy.

[53] CME in its defence and counterclaim challenged the validity of the tenancy agreement. It submitted that the lands upon which the premises is built were subject to an express condition that the lands must be used only for residential. Therefore the tenancy agreement was tainted with illegality as the contemplated use of the premises as specified in section H of the tenancy agreement contravened the above express condition of title for the lands (which restricted the use of the property to residential purposes).

[54] The above contention was supported by land search results in respect of the lands which were obtained by CME on 28 October 2013 ("the search results"). These land searchers revealed that the land was transferred from Kris Angsana Sdn Bhd to Bellajade on 11 January 2013. However, the express condition of title for the lands on which the subject properties were located provided as follows:

> Tanah yang dimaksudkan hendaklah digunakan semata2 untuk rumah kediaman.

[55] In its counterclaim, CME sought a declaration that the tenancy agreement was illegal and sought restitution for the rentals paid to Bellajade amounting to the sum of RM9,411,062.50.

[56] Bellajade referred to the salient terms of the SPA between Bellajade and Orion.

[57] Clause F acknowledged that the previous owner of the land Kris Angsana had applied to the Land Administrator of Kuala Lumpur for the surrender, re-alienation and change of use of the land (from residential) to commercial under s. 204D of the NLC.

[58] By cl. 6A of the SPA, arrangement was made by Orion Choice for CME Group Berhad to rent the property from Bellajade. It was agreed that upon completion of the SPA, Orion Choice shall cause CME Group Berhad to rent the properties and to execute the tenancy agreement simultaneously with the execution of the SPA.

[59] Approximately one and half months after the execution of the SPA, Kris Angsana's application for the "Surrender, Re-alienation, Amalgamation and Conversion of Land use" was approved by the State Authority for Wilayah Persekutuan. And as had been previously stated, Kris Angsana, present the letter of 9 May 2012 from the Land Administrator of Kuala Lumpur, paid the premium payable for the conversion, on 18 February 2013. Following which the Kuala Lumpur City Hall (DBKL) issued a certificate for fitness of occupation (CFO) for Plaza Palas.

[60] It is Bellajade's case that, at the time of the execution of the tenancy agreement, the express condition of title had for all intents and purposes been changed from 'residential' to 'mixed development'. Kris Angsana had paid the full premium of RM1,531,179 for the change of express condition of the lands and that Dewan Bandaraya Kuala Lumpur had already issued the CFO in respect of the premises. The CFO was for the said premises and the adjacent 24-storey condominium block. In view of the above and pursuant to cls. 3.2 and 4.1 of the SPA, on 20 July 2013, Bellajade paid the balance 90% of the purchase price thus completing the second SPA.

[61] On the other hand, CME and the guarantor averred that the process of conversion had not been completed because payment for the amount of additional premium imposed by the State Authority was still outstanding.

The Decision Of The High Court

[62] After a full trial, on 20 May 2015, the learned JC dismissed Bellajade's claim against CME and the guarantor and allowed CME's counterclaim.

[63] The learned JC found that the tenancy agreement was illegal and void *ab initio* as it had contravened the express condition of title of the lands. Premised on the same reason, the learned JC found the guarantee of tenancy agreement was also null and void. The learned JC found the "the fact that the process of conversion had been commenced did not change the fact that the express condition of title prohibited the use of the building for the purposes specified in section H of Schedule 1 of the tenancy agreement."

[64] In arriving at his decision, the learned JC relied on the Federal Court decision of *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1979] 1 LNS 96; [1980] 1 MLJ 21 (FC) where the Federal Court held that a tenancy agreement allowing the use of the lands in

A contravention of the express condition of title of the land was null and void under s. 24 of the Contracts Act 1950, for illegal consideration. The learned JC also found that CME had no notice of the illegality at the time it entered into the tenancy agreement. Hence the tenancy agreement was a contract that was 'discovered to be void' within the meaning of s. 66 of the Contracts Act B 1950. The learned JC then ordered restitution in favour of CME for the return of the rent paid under the contract thus allowing CME's counterclaim.

At The Court Of Appeal

[65] Aggrieved by the decision of the trial judge, Bellajade filed an appeal to the Court of Appeal. C

[66] Before the hearing of the appeal, Bellajade filed an affidavit dated 19 November 2015, producing a letter dated 16 November 2015 from the Pejabat Pengarah Tanah dan Galian to Bellajade's solicitors. It is stated in the said letter that Bellajade's appeal to the State Authority against the increase D of premium was still pending.

[67] However, at the hearing of the appeal before the Court of Appeal, Bellajade filed another affidavit dated 7 January 2016 producing another letter from Pejabat Pengarah Tanah dan Galian dated 16 December 2015 to Bellajade's solicitors. By the said letter, the letter of approval dated 9 May E 2015 which was previously issued to Kris Angsana was extended to Bellajade, as the new proprietor. Bellajade was also informed of the decision of the State Authority in maintaining its approval given on 8 May 2012. There was also no mention of any increase in the amount of the premium.

[68] The Court of Appeal allowed Bellajade's appeal. The court was of the F view that such change in the express condition of the lands falls within the context of sub-s. 124(1)(c) of the NLC. By sub-s. 124(4) of the NLC, the provision does not state that an application for change in the express condition of the land is effective only upon endorsement made on the documents of title; that based on the facts of the case, all conditions imposed G by the State Authority for the conversion of the lands had been fulfilled and that the full amount of premium in the sum of RM1,531,179 was paid on 14 February 2012. This had resulted in a change of use of the land from 'residential' to 'mixed development'.

[69] Referring to the PTG's letter dated 16 December 2015, the court H found that the approval given by the State Authority on 8 May 2012 was unrevoked.

I

[70] Alizatul Khair JCA (as she was then) held that:

> *The process of conversion was essentially completed at the time the tenancy agreement was entered into upon approval of the application for change by the state authority on 8 May 2012 and upon fulfilment of all conditions imposed including the payment of premium of RM1,531,179 on 14 February 2012.* Since the present case is concerned only with change in the express condition, based on s 124(4) it cannot be said that such change is only legally effective upon endorsement. The subsequent demand by the state authority for additional premium of RM3,810,143,10 to be paid for the conversion on 5 September 2013 some seven months after the tenancy agreement, does not in our view alter the position. This is because the approval given on 8 May 2012 remains unrevoked and was in fact reaffirmed in the PTG's letter of 16 December 2015. (emphasis added)

[71] The Court of Appeal then concluded that the process of conversion was essentially completed at the time the tenancy agreement was entered into and what remained pending was merely the administrative process of endorsing the State Authority's approval on the new titles.

The Law

[72] The NLC provides various provisions on land development. Land development involves the process of changing the category of land use, restriction in interest and express conditions and applications for sub-division, partition or amalgamation of land, wherever applicable as required by the proposed development plan.

[73] Land proprietors may choose the provisions that suit their proposed development plan and encumbrances on the title and other surrounding circumstances.

[74] Under the NLC, among others, land development is applicable in the following forms:

(i) Application for variation of conditions, restrictions and categories of land (s. 124)

(ii) Simultaneous applications for sub-division and variation of conditions, restrictions and categories (s. 124A), and

(iii) Application for sub-division (ss. 135-139)

(iv) Application for partition of land (ss. 140-145)

(v) Application for amalgamation of land (ss. 146-150)

(vi) Application for surrender and re-alienation – of lands by special provisions (ss. 204A-204H)

[75] In the present appeals, Kris Angsana made an application under s. 204D namely an application for surrender and re-alienation for contiguous lots held by the same proprietor.

[76] In 1984, the NLC was amended by Act A587; By s. 76 of Act A587, the NLC amended was made to insert in Part Twelve, a new subheading and new ss. 204A-204H which are provisions on surrender and re-alienation of lands. The amendment took effect on 28 June 1984.

[77] Based on the Hansard of Parliament dated 6 April 1984, the purpose of ss. 204A-204H is to expedite the process for land development. It is said that the land proprietor, instead of making separate applications for change of condition and subdivision of his land is given an alternative, namely to surrender the land to the State for the land to be re-alienated to the same proprietor in a different form and intended use as approved by the appropriate authority.

[78] According to Judith Sihombing in *The National Land Code – A Commentary* (2009, Issue 25, Lexis Nexis):

> Sections 204A-204H are designed for those situations where the State Authority has agreed to re-alienate the surrendered land in a different form then previously held, to the surrendering party.

[79] Based on s. 204D, a land proprietor is required to submit an application in Form 12D, accompanied by the prescribed fees and documents in respect of the land. Such documents include a plan showing the units to be re-alienated by the State Authority and layout plan as approved by the relevant authority. This is to enable the land to be re-alienated in the form and unit conforming to the intended use of the land.

[80] The application for surrender and re-alienation is to be endorsed on the register document of title by the Land Administrator. In the present case, based on the search results, Kris Angsana's application under s. 204D was registered on 22 November 2011.

[81] Section 204E describes the power of the State Authority and the considerations to be given in allowing an application for surrender and re-alienation. Section 204E is to be read together with s. 204C of the NLC. The latter governs the conditions for approval of surrender and re-alienation. Among others, sub-s. 204C(1)(a) prescribes that an application for surrender and re-alienation can only be approved by the State Authority if "the portions and units of the land to be re-alienated conform in shape, area, measurements, location and intended use with a layout plan approved by the appropriate authority".

[82] Based on sub-s. 204E(4) of the NLC, the State Authority in approving an application for surrender and re-alienation shall determine the matters specified in sub-s. 79(2) on alienation of State land. Such matters include, the area approved for alienation, the form of final title, payment of premium, the category of land use and any express conditions and restrictions in interest. The State Authority will then give a notification of its approval and determination required under sub-s. 79(2) to the proprietor.

[83] Upon receiving the notification under s. 204E(4), the land proprietor shall notify the State Authority if he accepts the determination made by the State Authority under s. 79(2).

[84] In the present appeals, Kris Angsana's application under s. 204D was approved by the State Authority on 8 May 2012. Kris Angsana was informed of the said approval *via* the letter of approval dated 9 May 2012, issued under sub-s. 204E(4). In the same letter, Kris Angsana was also informed of the State Authority's determination under sub-s. 79(2) of the NLC in the following terms:

> Kawasan Berkeliling Warna Biru Untuk Pembangunan Bercampur
>
> Jenis Suratan Hakmilik: Hakmilik Pejabat Tanah
>
> Mukim: Bandar Kuala Lumpur
>
> Taraf Pemilikan: Selama-lamanya
>
> Premium: Tanah Kerajaan berasal dari tanah milik RM215.00 s.m.p
>
> Cukai Tahunan: RM2.65 s.m.p tertakluk kepada minimum RM100.00 per hakmilik (kadar Pembangunan bercampur bagi tanah bandar)
>
> Jenis Penggunaan Tanah : Bangunan
>
> Syarat Nyata: Tanah ini hendaklah digunakan untuk Pembangunan bercampur bagi tujuan pangsapuri dan Pejabat sahaja.
>
> Sekatan Kepentingan:
>
> 2. Berikutan dengan keputusan tersebut di atas, bayaran yang perlu dijelaskan adalah seperti berikut:
>
> | | | |
> |---|---|---|
> | i) | Premium: | RM1,531,179.00 |
> | ii) | Cukai Tahunan Pertama: | RM18,873.00 |
> | | Penyediaan dan Pendaftaran bagi satu (1): | RM 120.00 |
> | | pasang hakmilik sepasang bagi hakmilik pertama RM70.00 sepasang hakmilik berikutnya | |
> | | Jumlah: | RM1,550,172.00 |

[85] The above determination of the State Authority was accepted by Kris Angsana. On 18 February 2013, Kris Angsana paid the full premium payable for the surrender and re-alienation. This is evident from the Sijil Pengesahan Kelulusan Permohonan issued by the PTG on 18 February 2013.

[86] The next procedure involves the surrender of the land to the State. This is governed by s. 204G. Based on sub-s. 204G(1), the land shall revert to the State upon the making of the memorial of surrender of the land in the register document of title. At this stage, the issue document of title in respect of the land will also be destroyed. Subsection 204G(2) reflects the agreement between the State Authority and the land proprietor for re-alienation of the land. Subsection 204G(2) reads:

> (2) Upon the making of any memorial pursuant to subsection (1), the land to which it relates shall revert to and vest in the State Authority as State land but the land shall be treated as being subject to the approval under section 204E of the re-alienation of the portions or units in question.

[87] The land which has been surrendered to the State is to be re-alienated to the proprietor under s. 204H of the NLC. The section reads:

> The provisions of this Act shall apply to all questions, matters and procedures relating to a portion or unit approved for re-alienation under this Part and arising after the land in which it is comprised has reverted to the State Authority pursuant to subsection (2) of section 204G as they apply to the alienation of State land under this Act.

[88] Based on s. 204H, provisions under the NLC which apply to alienation of State land are applicable to determine any matters arising from re-alienation of land surrendered to the State. This brought to the application of sub-s. 78(3) of the NLC. Subsection 78(3) of the NLC reads:

> (3) The alienation of State land shall take effect upon the registration of a register document of title thereto pursuant to the provisions referred to subsection (1) or (2), as the case may be; and, notwithstanding that its alienation has been approved by the State Authority, the land shall remain State land until that time.

Application

[89] In the present appeals, despite the fulfilment of all the conditions stated in the letter of approval dated 9 May 2012, the express condition of title of the land remains residential. This is evident from the search results obtained by CME. The endorsements made to the register title of the land as reflected in the search results reads as follows:

Tanggungan dan endosan-endosan lain:

…

Nombor Perserahan: 491/2011 Permohonan serahbalik, pemberimilikan semula tanah didaftarkan pada 22 Disember 2011 jam 03.04:04 petang

(No. Rujukan Fail: PTG/WP6/8008/2011)

Nombor Perserahan: 67/2013 Pindahmilik Tanah

Oleh Kris Angsana Sdn Bhd ½ Bahagian

Suite 2-1, 2nd Floor Menara Penang Garden 42-A Jalan Sultan Ahmad Shah Georgetown 100500 Pulau Pinang

Didaftarkan pada 11 Januari 2013 jam 03:02:57 petang

[90] It could be observed that an endorsement was made with respect to Kris Angsana's application for surrender and re-alienation of the land under s. 204D on 22 December 2011. However, the endorsement which was required under s. 204(G), in respect of the surrender of the lands to the State was not reflected in the search results. There was also no endorsement made with regard to the re-alienation of the land to Kris Angsana as required under s. 204H and sub-s. 78(3) of the NLC. Despite that, the land had been transferred from Kris Angsana to Bellajade on 10 January 2013.

[91] Applying sub-s. 78(3) of the NLC, it was submitted that the application under s. 204D of the NLC was not completed. The change of use to mixed development would have to be endorsed on the new title and become effective upon the issuance of the registration of a new issue document of title pursuant to sub-s. 78(3) of the NLC.

[92] It was also submitted by counsel that, the approval of the State Authority as contained in the letter of approval dated 9 May 2012 cannot be taken to imply that the change of use of the lands had taken place. Instead, under the Torrens system, the change of use of the land will only take effect upon endorsement of the change on the title to the land. However, this is not the case here.

[93] On the other hand, counsel for the respondents submitted that the Court of Appeal was correct in holding that s. 78(3) of the NLC is not applicable to the present case. The court had rightfully applied s. 124(4) of the NLC to the facts and circumstances of the case and concluded that the tenancy agreement was not void for illegality.

The Legal Position

[94] In the present appeals, the Court of Appeal in acknowledging that Kris Angsana's application was made under s. 204D of the NLC had applied the law in s. 124(4) of the NLC in determining whether the process of conversion had been completed. The issue was then answered in the affirmative. The

court was of the view that sub-s. 124(4) of the NLC does not state that a change in the express condition of land under sub-s. 124(1)(c) is effective only upon endorsement on the title.

[95] It is critical that a careful study is now made to s. 204D of the NLC, in the context of the first question.

> S. 204D Applications for approval surrender and re-alienation.
>
> (1) Any application for approval by a proprietor wishing to surrender his title or titles under this Part shall be made in writing to the Land Administrator in Form 12D and shall be accompanied by:
>
> (a) Such fees as may be prescribed;
>
> (b) All such written consents to the making thereof as are required under paragraph 204C(1)(e).
>
> (c) A plan showing the portion to be surrendered and a pre-computation plan showing the details of the portions and the units to be re-alienated, together with such number of copies thereof as may be prescribed or, in the absence of any such prescription, as the Land Administrator may require;
>
> (d) A copy of the layout plan, as approved by the appropriate authority, in respect of the said lot or lots, showing the portions and units to be realienated; and
>
> (e) The issue document of title to the land, unless the proprietor declares that it is for any reason incapable of production.
>
> (2) Where the proprietor is unable to produce the issue document of title for the reason that it is in the possession or control of any person or body, the application shall be accompanied by a sworn statement of the proprietor to that effect, and there shall be exhibited thereto a copy of a notice by the proprietor to that person or body requiring the production of the said document to the Land Administrator within fourteen days of the date of the service thereof on such person or body, and also the proof of service of such notice.
>
> (3) Upon receipt of the application, the Land Administrator shall endorse, or cause to be endorsed, a note thereof on the register document of title to the Land.

[96] Looking at the entire s. 204 regime, it is clear that it sets out how an application for surrender and re-alienation is to be made by a proprietor. In other words, s. 204 is a **procedural regime**. It is not the provision under which the State Authority grants the approval. Herein lies the rub. (emphasis added)

[97] Section 124 of the NLC on the other hand, envisages the power of the State Authority in an application made by the proprietor to vary the conditions. The language of s. 124 is clear.

[98] Subsection 124(1)(a), (b), (ba) and (c) deal with the four types of power of the State Authority as follows:

> 124. Power of State Authority to vary conditions, etc., on application of proprietor.
>
> (1) The proprietor of any alienated land may apply to the State Authority under this section for:
>
> (a) The alteration of any category of land use to which the land is for the time being subject or, where it is not so subject, for the imposition of any category thereon;
>
> (b) The rescission of any express condition or restriction in interest endorsed on, or referred to in, the document of title thereto, or the removal from that document of the expression "padi", or any other expression by virtue of which the land is subject for the time being to the implied conditions specified in section 119; or
>
> (ba) the removal from the document of title of the expression "rubber", "kampung" or any expression pertaining to land use, and the imposition of other express conditions pertaining to land use;
>
> (c) The amendment of any express condition or restriction in interest endorsed on, or referred to in, the document of title thereto, or the imposition of any new express condition or restriction in interest;"

[99] It is clear that this appeal falls under sub-s. 124(1)(c). Concomitantly, sub-s. 124(4) is critical and applies with equal force. It reads:

> 124(4) The State Authority may approve any application under paragraph (1)(c) either in the terms in which it was submitted or, with the consent of the applicant and any other persons or bodies whose consent thereto was required under the proviso to that subsection, subject to such modifications as it may think fit, and shall, in either case, direct as appropriate:
>
> (a) The amendment of any condition or restriction in interest endorsed on the document of title to the land; or
>
> (b) The endorsement on that document of title of a note of the amendment of any condition or restriction which is merely referred to therein; or
>
> (c) The endorsement on that document of title of any new condition or restriction in interest.

Thus, when the State Authority approves an application to amend an express condition, it can make three directions under s.124(4)(a), or (b) or (c) (please see above).

[100] In this case, the State Authority gave the approval for change and imposed the payment of a further premium of RM1,550,172 under sub-s. 124(5), which amount was duly paid by Bellajade.

[101] The State Authority allowed the application under sub-s. 124(4)(a). The approval letter of 9 May 2012 did not make any order for endorsement under sub-s. 124(4)(b) or (c).

[102] We must also have regard to the provision of s. 113 of the NLC, which explains the manner in which changes may be effected.

> **Changes In Conditions And Restrictions**
>
> **113. Manner in which changes may be effected.**
>
> The conditions and restrictions in interest applicable to any alienated land shall, after becoming fixed by the operation of any of the preceding provisions of this Chapter, be subject to all such changes as may result from:
>
> (a) The granting of any application by the proprietor under subsection 124(1); or
>
> (b) The carrying into effect of any direction given by the State Authority under subsection 147(3) on sanctioning the amalgamation of the land with other land.

[103] Section 113(a) specifically provides that lands already alienated and already the subject of existing conditions and restrictions, shall be subject to all such changes as a result from:

(a) The granting of any application by the proprietor under sub-s. 124(1);

[104] Section 113 is an important provision since it provides that the change in condition etc, takes place on the granting of the application under sub-s. 124(1), ie, upon the State Authority approving the application by the proprietor for a change in the condition.

[105] At the risk of repetition, it must be emphasised that approval was granted on 8 May 2012 at the meeting of the Jawatankuasa Kerja Tanah W.P. (Tab A) and the payment of the full premium of RM1,550,172.80 on 14 February 2013 (Tab G & H).

[106] All of the above goes to show plainly that sub-s. 204D is a procedural regime, where an application is made under that section. But – and this is critical – the State Authority does not grant approved under s. 204D. That is the province of s. 124 of the NLC. Thus viewed in perspective, the first question results in the parties getting themselves into a knot.

[107] The first question therefore requires no answer, because obviously the question is flawed. If at all, it may be answered in the negative, since notwithstanding that the Sijil issued by the Pengarah Tanah dan Galian Wilayah Persekutuan, was a general or standard certificate applicable for application, *inter alia* under s. 124 or 204D, it did not convert the s. 204D application into containing an implicit or subsumed s. 124 application within it.

The Second Question Of Law

Whether Change Of Condition Of Land Under Section 124 Of NLC Takes Effect Upon Endorsement Of The Same On The Issue Document Of Title To The Land In Question?

[108] In view of the conclusion reached in the first question of law, it is rendered academic and will no longer determine the outcome of the case. What follows in this section is accordingly *obiter*. While an answer is not necessary in the present circumstances, we find much support for the position adopted by the Court of Appeal in holding that a change of conditions of land under s. 124 of the NLC takes place upon approval rather than upon endorsement on the issue document of title to the land.

[109] Crucial to this interpretation is the content of the subsections of s. 124. The Court of Appeal made reference to this in its judgment:

> [54] Section 124(4) merely provides that if the state authority approves an application under s. 124(1)(c) in accordance with the provision therein, then the state authority shall direct, as appropriate, *inter alia*, that the amended condition or restriction of interest as the case may be, be endorsed on the title. The subsection does not state that the change in condition is effective only upon endorsement of such change.
>
> [55] In contrast, s. 124(2) provides that where the state authority approves an application for an alteration in the category of land use under subsection (1)(a), it shall direct that the new category of land use be endorsed on the title and it may direct that there shall be endorsed on the title such new express conditions as are specified in the direction, and, as from the date on which the direction is carried into effect:
>
> (i) the land shall become subject to any conditions endorsed pursuant thereto and (according to the category of land used so endorsed) to the conditions implied by section 115, 116 or 117;
>
> (ii) there shall cease to apply to the land all conditions to which it was previously subject except those implied under section 114 and, where applicable, 118.
>
> [56] Thus, in respect of change in the **category** of land use, the **conditions imposed**, if any, upon approval of any application from such change, shall have effect only from the date the conditions are endorsed on the title. Whilst in the case of a change of **express condition** under section 124(4) of the NLC the endorsement of the new condition on the title does not have any legal effect … (emphasis added)

[110] It seems to us to be in keeping with the consistent interpretation of the provision to hold that, unlike in the case of a change of **category** of land use, the variation of the express conditions of use where it does not involve a change in category of land use does not require the endorsement of the conditions on the document of title to the relevant land. The comparison is, therefore, not between variations of the category of land use and variations of the express conditions of use but only as to express conditions either within the context of an application to change the category of land or in contrast to change the express condition only.

[111] In the circumstances envisaged by sub-s. 124(2), the primary purpose of the application is to apply for a change in the category of land use. Ancillary or secondary to that, the State Authority of its own accord (or, it stands to reason, included in the proprietor's application) decides to impose express conditions which it sees fit to impose, usually related to the change in the category of land use. In this context, the newly imposed conditions only take effect from the date the direction (namely the endorsement on title) is carried into effect. This is the explicit requirement of the statute.

[112] However, where the application is for one under s. 124(1)(c), namely merely for the variation of express condition, the NLC does not specify the date from which the varied or newly imposed conditions take effect as the date of endorsement of the variation on title. It stands to reason therefore, that the difference in treatment of the various subsections is not accidental and that accordingly, specificity as to the date on which the conditions take effect in the former case within the context of change of category must indicate that it departs from the normal set of rules, otherwise those provisions would be rendered redundant. Therefore, as long as the conditions imposed under sub-s. 124(5) have been complied with, the requirement for the varied condition to take effect have been met and accordingly, the express condition, as varied, takes immediate effect.

[113] Furthermore, the structure of s. 124 has been meticulously laid out such that the provisions of sub-s. 124(2), (3) and (4) are designed to deal with the three types of applications under sub-ss. 124(1)(a), (b) and (c). Therefore, it would be perplexing that the NLC would specify the date for which conditions under the change of category application took effect without specifying the same in sub-s. 124(4) – not even by reference to sub-s. 124(2) –if they intended both to take effect upon the happening of the same event, namely endorsement of title.

[114] In addition, sub-s. 124(7) does not purport to set out the date for which the variation comes into effect. That in the context of changes in the category of land use is purported to be legislated under sub-s. 124(2). Instead, sub-s. 124(7) sets out the obligations of the State Authority post-approval with respect to the register and the documents of title, which is in accordance with efficient and efficacious administration.

[115] Thus we are in agreement with the Court of Appeal that "once the State Authority approves the change of use under sub-s. 124 of the NLC and the conditions of the approval (under sub-s. 124(5) of the NLC) are satisfied, the change of use takes effect." This conclusion is reached bearing in mind the view of Harun J (as he then was) in the case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 where it was held that 's. 124 deals with conversion and that if it is approved the effect will be to change the express conditions imposed on the land.' Had this question been necessary to dispose of the appeal, we would have answered the question in the negative.

The Third Question Of Law

Whether A Tenancy For Commercial Use Of Land Which Is By Condition For Residential Use Is Illegal And Void Having Regard To The Decisions Of The Federal Court in Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd [1979] 1 LNS 96; [1980] 1 MLJ 21 And Toh Huat Khay v. Lim Ah Chang [2010] 7 CLJ 261; [2010] 4 MLJ 312.

[116] We will now turn to consider the third question of law posed in this appeal, which in our opinion is the crux of the present appeal before the court. The question turns on the interpretation of the cases, in particular the *Singma Sawmill* case.

[117] The learned JC in the High Court had this to say regarding the decision in *Singma Sawmill*:

> [24] In facts of *Singma Sawmill Co. Sdn Bhd v. Asian Holding (Industral Buildings) Sdn Bhd* are directily on points to the issues at hand. In this case, the plaintiff sought to recon arrears of rent from the defendant tenant, who had been let a portion of the plaintiff's land 'solely for the purpose of operating a factory'. The defendant ceased to pay rent upon being warned by a representative of the Industrial Development Department of the Government of the State of Johor that its factory was operating illegally and in breach of an express condition of title. The land in question was agricultural land and was subject to an express condition that it was to be used for the cultivation of pineapple and rubber. The court made a finding of fact that the defendant was not aware of the express condition at the time it entered into the tenancy agreement and only found out about it when it was warned by the authorities.
>
> [25] The Federal Court in this case affirmed the decision of the trial judge, who held that the plaintiff was guilty of giving an illegal consideration to the tenancy agreement and as such the contract was void under section 24 of the Contracts Act, 1950.

[118] Section 24 of the Contracts Act 1950 reads as follows:

> What considerations and objects are lawful, and what are not
>
> 24. The consideration or object of an agreement is lawful, unless:
>
> (a) It is forbidden by law;
>
> (b) It is of such a nature that, if permitted, could defeat any law;
>
> (c) It is fraudulent;
>
> (d) It involves or implies injury to the person or property of another; or
>
> (e) The court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[119] In our opinion, the answer to the third question revolves around the proper interpretation of the *Singma Sawmill* decision. The Federal Court in deciding *Singma Sawmill* did not do so in a vacuum but did so against the backdrop of a number of crucial factors. These factors include:

(i) The land was under the category of agricultural land whereas the tenancy agreement required the land to be under the category of industrial land.

(ii) Prior to entering into the tenancy agreement, the proprietor had applied unsuccessfully to change the category of land use from agricultural to industrial.

(iii) A representative from the State Government warned the tenant that it was operating the factory illegally and in breach of the express condition.

(iv) The State Department informed the proprietor of the breach and requested that it remedy the situation but this was ignored.

(v) No approval for the change of category or condition had been obtained from the State Authority. It was in defiance of the State Authority's decision that the tenancy agreement was entered into. In fact, so egregious was the breach in *Singma Sawmill*, that Raja Azlan Shah CJ (Malaya) (as His Royal Highness then was) termed it "wilful, if not, contumacious."

[120] This is borne out in a later passage in the judgment which reads:

> In the present case, the breach of the express condition is wilful, if not contumacious. There is a clear intention on the part of the Appellants (Singma) to use the subject matter of the agreement ie, land on which the factory was created, for an unlawful purpose. The object of the express

> condition is that the land must be cultivated with rubber and pineapple, the category of land is agriculture, and any unilateral conversion to industry is not permitted.
>
> Indeed, neither party had the power to waive the express condition which inextricably runs with the land. If that is permitted it would be entirely to ignore the object of the express condition which is for the public good and to defeat the law relating to land use.

[121] It is evident that in that case, the evidence of a clear intention on the part of Singma to contravene the breach of condition against the backlog of a prior refusal of its application to change the category of land use was at the heart of the judgment of the Federal Court. Furthermore, in *Singma* there was an attempt on the part of the proprietor to unilaterally waive the express conditions to land use which is to be distinguished from the exercise of discretion of the relevant State Authority through the provisions of the NLC. This, also, informed the decision of the Federal Court.

[122] In formulating the principle that arises out of *Singma Sawmill*, we cannot be unaware of the vast differences between *Singma Sawmill* and the present case. The effect is such as to place *Singma Sawmill* on the far end of the spectrum of purported illegality whereas the present case sits at the other end of the spectrum. Our view is that the proposition in *Singma* that a tenancy agreements is void for allowing the use of land in contravention of the express condition can only reliably be said to extend to situations whereby the contravention is deliberate, and cannot be applied where approval prior to the agreement being entered into had been sought and obtained, especially where what was left to be done was in the hands of the State Authority.

[123] In a similar fashion, the case of *Ton Huat Khay* does not apply where approval from the State Authority has been obtained. In *Ton Huat Khay* the Federal Court was mindful of the fact that the proprietor, while owning land subject to a restriction in interest and purported to transfer it, had not even made an application to the State Authority to rescind or strike off the interest, much less obtained approved. While the State Authority had purported to consent to the transfer, no consent was possible since the application required had not even been made in accordance with the provisions of the NLC. (See the judgment of the Court of Appeal in the instant case at [67].

[124] It has been argued that the mere fact that action had not been taken against the plaintiff by the land office or the PTG's office is not a sufficiently good argument for the lack of illegality of the tenancy agreement. In that respect, we agree. However, the court must be able to distinguish between a form of mere inaction by the State Authority arising out of a variety of reasons (including but not limited to ignorance, a shortage of administrative

or enforcement resources, or negligence) and a considered refusal to act on the basis of prior approval mounting to what it considers not to be a breach of action. We are of course not unaware that the Land Administrator is required to act under ss. 127-129.

[125] Though the provisions have been considered at length in his judgment, it is evident that in matters pertaining to the variation of express conditions of land use or the process of surrender and realienation are decided the purview of the State Authority. In each case, it is the State Authority's approval that must be sought before any legal effect to land can be achieved. It is the intention of the National Land Code to vest, or indeed to recognise, such discretion with the State Authority (eg, s. 204B). While this does not mean that the State Authority's decision in its discretion, trumps the provisions of the National Land Code, it ought to mean that if the only steps left to be accomplished are in the exclusive purview of the State and not the proprietor, the proprietor ought not bear the burden of having his agreement be rendered void or a purported illegality that was neither his fault nor within his control.

[126] In reaching a conclusion in the instant case, it is necessary to appreciate the extent to which compliance had been achieved or had been sought on the part of the respondent. An application under s. 204D had been duly made by its predecessor in title. Prior to any tenancy agreement being entered into, state approval for the change of express condition had been granted as evidenced in writing. The conditions, insofar as they were applicable, for the payment of the premium had also be satisfied and the State Authority had certified its approval of the surrender and realienation (which involved the change of land use) prior to the tenancy agreement being extent into. What remained was for the memorial of surrender of the land by the State Authority.

[127] In legal terms, this meant that the s. 204D application had been duly submitted without issue; approval indicated that the requirements of s. 204C had been met to the satisfaction of the State Authority (per s. 204E(1); the first that the respondent (or the respondent's predecessor in title) was notified of the approval under s. 204E(4) also meant that the determinations in s. 79(2) had been satisfactorily completed. All that was left to be done were that requirements of s. 204G, which properly construed is a matter for the State Authority, apart from the notification by the proprietor. Where no alterations were made under s. 204E(2), it stands to reason that the proprietor's notice to that State Authority may be implied.

[128] Accordingly, the CFO does not clothe the tenancy agreement with legality because it could not be said to be illegal upon consideration of all the factors in the instant case. The question of illegality will have to be determined, in such unusual cases, on the individual facts of the case. This

does not, however, mean that illegality as a legal concept is subjected to obfuscation but that what constitutes illegality in a multi-step case such as this where substantial compliance on the part of the applicant proprietor (the respondent) is achieved, and the only acts left to be accomplished are acts of the State – unexplainably left undone – means that the contract cannot fairly be said to defeat the purpose of any law.

[129] Taking all the aforesaid into consideration, I have come to the conclusion that the proposition in *Singma Sawmill* is not so broad as to render illegal a tenancy agreement, where an application has been made by the proprietor for the variation of the express condition, and that application has been approved by the State Authority, and the conditions attached to that approval have been met, leading to the conclusion that the applicant proprietor has done all that is required under the National Land Code. Notwithstanding that the registration and re-issue of the documents of title have not yet been actioned by the State Authority, the combination of factors above is such as to prevent the agreement from falling foul of the provisions of s. 24 of the Contracts Act 1950. That is to say that it would not be in any meaningful way forbidden by law – since had the law operated in propriety, it would not have contravened any law – neither would it defeat the purpose of any law. It ought to be stressed, however, that we consider this to be an unusual case on the fact, and with likely be of application only in excepted circumstances.

Conclusion

[130] For the reasons stated in this judgment, I would dismiss the appeals by the appellants in Appeal 135 and Appeal 136 with costs.